

AUG 27 1992

OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1992

CSX TRANSPORTATION, INC., PETITIONER

v.

LIZZIE BEATRICE EASTERWOOD

LIZZIE BEATRICE EASTERWOOD, PETITIONER

v.

CSX TRANSPORTATION, INC.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING AFFIRMANCE

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

WALTER B. MCCORMICK, JR.
General Counsel

MAUREEN E. MAHONEY
Deputy Solicitor General

PAUL M. GEIER
*Assistant General Counsel
for Litigation*

WILLIAM K. KELLEY
*Assistant to the Solicitor
General*

DALE C. ANDREWS
*Deputy Assistant General
Counsel for Litigation
Department of
Transportation
Washington, D.C. 20590*

WILLIAM KANTER
JEFFREY CLAIR
*Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217*

QUESTIONS PRESENTED

1. Whether federal statutes and regulations relating to railroad-highway grade crossings preempt a state law cause of action against a railroad based on the alleged breach of the railroad's duty to provide adequate safety devices at grade crossings.

2. Whether federal regulations setting speed limits for trains on all classes of track nationwide preempt a state law cause of action against a railroad for operating its train at an unreasonable speed.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	10
Argument:	
I. State law requirements relating to rail safety are not preempted by FRSA unless the Secretary has adopted regulations covering the same subject matter as the state requirement at issue.....	13
II. Federal law has not preempted all state law duties on railroads to maintain safe grade crossings, but has preempted such duties at grade crossings improved using federal funds	17
A. The MUTCD does not oust the States' traditional police power to require railroads to provide safe grade crossings	18
B. The regulations implementing the Rail-Highway Crossings Program do not entirely preempt State law duties of care, but do preempt States from requiring railroads to provide more or different safety devices at crossings that are improved using federal funds	23
C. The grade crossing claim is not preempted because there is no evidence that the Cook Street crossing was improved using federal funds	26
III. State law requirements concerning train speed are preempted by FRSA because the Secretary has adopted regulations covering the subject matter of train speed	27
Conclusion	30

IV

TABLE OF AUTHORITIES

Cases:	Page
<i>Arkansas v. Oklahoma</i> , 112 S. Ct. 1046 (1992)	22
<i>Bethlehem Steel Co. v. New York State Labor Relations Board</i> , 330 U.S. 767 (1947)	27
<i>Central of Georgia R.R. v. Markert</i> , 410 S.E.2d 437 (Ga. Ct. App. 1991)	2, 28
<i>Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.</i> , 467 U.S. 837 (1984)	22
<i>Cipollone v. Liggett Group, Inc.</i> , 112 S. Ct. 2608 (1992)	13, 14, 15
<i>Clifton v. Southern Pac. Transp. Co.</i> , 709 S.W.2d 636 (Tex. 1986)	17
<i>Continental Improvement Co. v. Stead</i> , 95 U.S. 161 (1877)	4
<i>Decker v. Norfolk & Western R.R.</i> , 265 N.W.2d 785 (Mich. Ct. App.), appeal denied, 403 Mich. 845 (1978)	17
<i>English v. General Electric Co.</i> , 496 U.S. 72 (1990)	14
<i>FMC Corp. v. Holliday</i> , 111 S. Ct. 403 (1990)	14
<i>Farmer v. United Brotherhood of Carpenters</i> , 430 U.S. 290 (1977)	14
<i>Fidelity Federal Savings & Loan Ass'n v. De La Cuesta</i> , 458 U.S. 141 (1982)	14
<i>Florida Lime & Avocado Growers, Inc. v. Paul</i> , 373 U.S. 132 (1963)	14
<i>Gade v. National Solid Wastes Management Ass'n</i> , 112 S. Ct. 2374 (1992)	13-14, 30
<i>Grand Trunk R.R. v. Ives</i> , 144 U.S. 408 (1892)	4
<i>Hatfield v. Burlington Northern R.R.</i> , 958 F.2d 320 (10th Cir. 1992), petition for cert. pending, No. 91-1977	18
<i>Hillsborough County v. Automated Medical Laboratories, Inc.</i> , 471 U.S. 707 (1985)	14, 16, 22
<i>Hines v. Davidowitz</i> , 312 U.S. 52 (1941)	14, 30
<i>Isom v. Schettino</i> , 199 S.E.2d 89 (Ga. Ct. App. 1973)	2
<i>Jones v. Rath Packing Co.</i> , 430 U.S. 519 (1977)	14
<i>Macon & Western R.R. v. Davis</i> , 18 Ga. 679 (1855)	15

V

Cases—Continued:	Page
<i>Marshall v. Burlington Northern, Inc.</i> , 720 F.2d 1149 (9th Cir. 1983)	18, 27
<i>Missouri Pacific R.R. v. Railroad Comm'n of Texas</i> , 833 F.2d 570 (5th Cir. 1987)	16
<i>Morales v. Trans World Airlines, Inc.</i> , 112 S. Ct. 2031 (1992)	16
<i>Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n</i> , 461 U.S. 190 (1983)	14
<i>Pennhurst State School & Hosp. v. Halderman</i> , 451 U.S. 1 (1981)	25
<i>Perkins v. National R.R. Passenger Corp.</i> , 298 N.W.2d 462 (Minn. 1979)	17-18
<i>Public Utilities Comm'n v. CSX Transp., Inc.</i> , 111 S. Ct. 781 (1991)	20
<i>Ray v. Atlantic Richfield Co.</i> , 435 U.S. 151 (1978) ..	27
<i>Rice v. Santa Fe Elevator Corp.</i> , 331 U.S. 218 (1947)	14
<i>Runkle v. Burlington Northern</i> , 613 P.2d 982 (Mont. 1980)	21
<i>Shaw v. Delta Air Lines, Inc.</i> , 463 U.S. 85 (1983) ..	14
<i>Southern Ry. v. Georgia Kraft Co.</i> , 373 S.E.2d 774 (Ga. Ct. App. 1988)	20
<i>Stromquist v. Burlington Northern, Inc.</i> , 444 N.E.2d 1113 (Ill. App. 1983)	17
<i>Wright v. Dilbeck</i> , 176 S.E.2d 715 (Ga. Ct. App. 1970)	20
Constitution, statutes, and regulations:	
U.S. Const. Art. VI, Cl. 2 (Supremacy Clause) ..	13
Federal Railroad Safety Act of 1970, Pub. L. No. 91-458, 84 Stat. 971 (45 U.S.C. 421 <i>et seq.</i>)	1, 4
45 U.S.C. 421	5, 22
45 U.S.C. 431	5
45 U.S.C. 431 (q)	5
45 U.S.C. 433 (a)	5
45 U.S.C. 433 (b)	5
45 U.S.C. 434	2, 3, 6, 10, 15, 16, 18, 19, 20, 29
45 U.S.C. 435 (a)	5
45 U.S.C. 436 (a)	5

VI

Statutes and regulations—Continued:

	Page
45 U.S.C. 436 (a) (2)	5
45 U.S.C. 436 (b)	5
45 U.S.C. 436 (b) (2)	5
45 U.S.C. 437	7
45 U.S.C. 438	7
45 U.S.C. 438-439	7
Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282	4, 6
23 U.S.C. 130	4, 6, 10, 11, 24
23 U.S.C. 130 (a)	6
23 U.S.C. 130 (b)	9
23 U.S.C. 130 (c)	9
23 U.S.C. 130 (d)	7, 10
Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, § 23, 102 Stat. 639	5
23 U.S.C. 109 (d)	18
23 U.S.C. 409	25
Ga. Code Ann. § 32-6-190 (Michie 1991)	2
23 C.F.R.:	
Pt. 1:	
Section 1.14 (b) (1958)	9
Pt. 625:	
Section 625.3 (1974)	18
Pt. 646	24
Section 646.210 (a)	9, 25
Section 646.210 (b) (1)	9
Section 646.210 (d)	9
Section 646.214 (b)	3, 8, 9, 12, 18, 23, 24
Section 646.214 (b) (2)	23
Section 646.214 (b) (3) (i)	8, 23, 25
Section 646.214 (b) (4)	8, 24
Section 646.216 (b)	9
Pt. 655	24
Section 655.601-655.603 (1991)	10, 18
Section 655.601 (1974)	18
Section 655.603	9
Section 655.603 (b)	22

VII

Regulations—Continued:

	Page
Pt. 924	24
Section 924.7	7
Section 924.9	7
Section 924.9 (a)	7-8
Section 924.13	8
Section 924.15	8
Pt. 1204:	
Section 1204.4, Highway Safety Pro- gram Guideline No. 12 (G)	7
49 C.F.R.:	
Pt. 1:	
Section 1.48 (o)	5
Section 1.49 (m)	5
Pt. 201:	
Section 201.4	7
Pt. 213	7, 12, 28
Section 213.53	28
Section 213.55	28
Section 213.57	28
Section 213.59	28
Section 213.63	28
Section 213.109	28
App. A	7
Pt. 215:	
Section 215.9	28
Pt. 218:	
Section 218.29	29
Pt. 219:	
Section 219.213 (b)	17
Pt. 229:	
Section 229.9	28
Section 229.117	29
Pt. 236	28
Pt. 240:	
Section 240.305	28
56 Fed. Reg. 33,722 (1991) (23 C.F.R. Pt. 234)	7

VIII

Miscellaneous:	Page
91 A.L.R.2d (1963)	21
FRA Emergency Order No. 11, 44 Fed. Reg. 8402 (1979)	29
<i>Prevention of Rail-Highway Grade Crossing Acci- dents Including Railway Trains and Motor Ve- hicles</i> , 322 I.C.C. 1 (1964)	21-22
Report of the Secretary of Transportation to Con- gress, <i>Rail-Highway Crossings Study</i> (1989)	4, 9, 17, 21, 25, 26, 29, 30
U.S. Dep't of Transportation, Federal Highway Administration, Federal Highway Administra- tion Bulletin (Apr. 1, 1977)	19
U.S. Dep't of Transportation, <i>Manual on Uniform Traffic Control Devices</i> (1988)	9, 10, 11, 19, 20, 21, 29
U.S. Dep't of Transportation, <i>Railroad-Highway Safety Part I: A Comprehensive Statement of the Problem</i> (1971)	6, 25
U.S. Dep't of Transportation, <i>Railroad-Highway Safety Part II: Recommendations for Resolving the Problem</i> (1972)	6
U.S. Dep't of Transportation, <i>Traffic Control De- vices Handbook</i> (1983)	18, 21
<i>Webster's Third New International Dictionary</i> (1986)	16

In the Supreme Court of the United States

OCTOBER TERM, 1992

No. 91-790

CSX TRANSPORTATION, INC., PETITIONER

v.

LIZZIE BEATRICE EASTERWOOD

No. 91-1206

LIZZIE BEATRICE EASTERWOOD, PETITIONER

v.

CSX TRANSPORTATION, INC.

ON WRITS OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING AFFIRMANCE**

INTEREST OF THE UNITED STATES

This case concerns the preemptive effect of certain federal laws and regulations on state law tort claims arising out of accidents at railroad-highway grade crossings. The most pertinent federal statute at issue, the Federal Railroad Safety Act of 1970, 45 U.S.C. 421 *et seq.*, contains an express preemption provision triggered solely through regulatory action by the Secretary

of Transportation. See 45 U.S.C. 434. The Secretary of Transportation therefore has a strong interest in the interpretation of the rail and highway safety regulations that govern the outcome of this case.

STATEMENT

1. a. On the morning of February 24, 1988, Thomas Easterwood, the husband of respondent/cross-petitioner Lizzie Beatrice Easterwood, was killed when the truck he was driving was struck at the Cook Street grade crossing in Cartersville, Georgia by a train owned and operated by petitioner cross-respondent CSX Transportation, Inc. Following her spouse's death, Mrs. Easterwood sued the railroad for tort damages in her capacity as executrix of Mr. Easterwood's estate. Under Georgia law, CSX had a duty to provide adequate warning devices at the Cook Street crossing to ensure the safe passage of traffic. See Ga. Code Ann. § 32-6-190 (Michie 1991); see also *Central of Georgia R.R. v. Markert*, 410 S.E.2d 437 (Ga. Ct. App. 1991); *Isom v. Schettino*, 199 S.E.2d 89 (Ga. App. 1973). The Cook Street crossing was equipped with flashing lights, but did not have crossing gates. Mrs. Easterwood alleged, *inter alia*, that the railroad breached its duty of care because crossing gates, and not merely flashing lights, were necessary to make the crossing reasonably safe. CSX Pet. App. 10a. She also alleged that the railroad breached its common law duty to operate the train at a safe speed. *Id.* at 25a. CSX defended by claiming, *inter alia*, that Mrs. Easterwood's claims were preempted by federal laws and regulations pertaining to railroad safety.

b. Accepting CSX's preemption defense, the district court granted summary judgment for the railroad. CSX Pet. App. 28a. The court held that Mrs. Easterwood's allegations concerning both the adequacy of the crossing

signals and the safety of the train's operating speed were preempted by federal law. *Id.* at 26a-27a.¹

The court of appeals affirmed in part and reversed in part. The court agreed that Mrs. Easterwood's negligence claim based on excessive train speed was preempted by Federal Railroad Administration regulations. On the grade crossing issue, however, the court held that a railroad's state law duty to provide a safe grade crossing was not preempted, at least where the State has "neither upgraded the grade crossing nor affirmatively decided that the existing crossing was adequate." CSX Pet. App. 12a. The court reasoned that FRSA's express preemption provision, 45 U.S.C. 434, was not implicated because the Secretary had not promulgated any regulations relating to grade crossing safety pursuant to that statute, see CSX Pet. App. 10a-11a. Moreover, the court held, federal highway statutes and regulations addressing grade crossing safety are not so "pervasive * * * that we could fairly imply a congressional intent to pre-empt the field." CSX Pet. App. 11a. Alternatively, the court concluded that even if those regulations had some preemptive effect, Mrs. Easterwood's claims were not preempted because "[t]he record reflects that due to various financial con-

¹ There was no evidence that the warning devices in place at the Cook Street crossing had been installed with federal funds pursuant to the standards set forth in 23 C.F.R. 646.214(b). Cf. Affidavit of Wendall A. Hester ¶ 7 (Nov. 30, 1989) (stating that the circuitry at the Cook Street crossing was upgraded pursuant to a federally funded project to improve another grade crossing in Cartersville). The evidence showed that the Cook Street crossing had been surveyed by the State pursuant to the federal Rail-Highway Crossings Program (see pp. 6-10, *infra*), but that gate arms had not been installed. CSX Pet. App. 26a. It is unclear why gate arms were not installed. CSX claims that the Georgia Department of Transportation determined that gate arms might create traffic problems, Pet. 5, while the district court stated that the reason was that the "funds earmarked for [the installation of gate arms] were * * * transferred to other projects." CSX Pet. App. 26a.

straints and logistical problems, the state wanted to upgrade the site but was unable" to do so. *Id.* at 12a. The court concluded that "a policymaker's failure to act is insufficient to constitute preemption." *Ibid.*

2. Since the nineteenth century, state and federal authorities have sought effective methods of improving the safety of railway crossings. That traditionally occurred in three ways. First, States imposed common law and statutory tort duties on railroads requiring due care in the design and maintenance of grade crossings. See, e.g., *Grand Trunk R.R. v. Ives*, 144 U.S. 408, 416-420 (1892); *Continental Improvement Co. v. Stead*, 95 U.S. 161 (1877). Second, because railroads often needed to install warning devices on the public roadway in order to satisfy those duties, state authorities assumed an oversight role and required railroads to obtain state approval of such installations. Third, as automobile traffic increased, States and the federal government came to recognize greater public responsibility, and accordingly supplemented the railroads' efforts by funding safety improvements at rail crossings. Federal funds were authorized for this purpose as early as 1916. See Report of the Secretary of Transportation to Congress, *Rail-Highway Crossings Study 1-8* (1989) (1989 Report to Congress).

More recently, Congress responded to continuing concerns about crossing safety, and rail safety more generally, with the passage of two statutes of importance to this case: the Federal Railroad Safety Act of 1970 (FRSA), Pub. L. No. 91-458, 84 Stat. 971, codified as amended at 45 U.S.C. 421 *et seq.*, and the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, codified as amended at 23 U.S.C. 130. The question in this case is the extent to which these two statutes and the regulations implementing them altered the traditional scheme of regulation by preempting a railroad's state law duty to provide a reasonably safe grade crossing and to travel at a reasonable speed.

3. In 1970, Congress enacted the Federal Railroad Safety Act to "promote safety in all areas of railroad operations." 45 U.S.C. 421. To achieve those goals, FRSA vested the Secretary of Transportation with broad authority to prescribe rules governing rail safety.² 45 U.S.C. 431. In addition, FRSA specifically addressed the regulation of grade crossings by: (1) directing the Secretary to "undertake a coordinated effort toward the objective of developing and implementing solutions to the grade crossing problem," 45 U.S.C. 433(b); (2) requiring the Secretary to submit to Congress a comprehensive report recommending a program to improve grade crossing safety, 45 U.S.C. 433(a); and (3) directing the Secretary to issue "such rules, regulations, orders, and standards as may be necessary to ensure the safe maintenance inspection, and testing of signal systems and devices at railroad highway grade crossings." 45 U.S.C. 431(q), added by the Rail Safety Improvement Act of 1988, Pub. L. No. 100-342, § 23, 102 Stat. 639.

Congress addressed the role of the States in the regulatory scheme established by FRSA in two respects. First, the statute provides that States may participate in the regulatory enforcement of federal standards if they establish a state program and comply with certain reporting requirements. 45 U.S.C. 435(a).³ Second, the Act

² The Secretary has delegated general authority to promulgate rail safety rules and regulations under FRSA to the Federal Railway Administration (FRA). 49 C.F.R. 1.49(m). The Secretary has also delegated rulemaking authority to the Federal Highway Administration (FHWA) with respect to rules that also pertain to highway safety. See 49 C.F.R. 1.48(o), 1.49(m).

³ In cases where the Secretary has not brought enforcement proceedings arising out of a violation of federal regulations, a participating State is authorized to bring an enforcement action in federal district court seeking monetary fines (which cannot exceed \$20,000) or injunctive relief. 45 U.S.C. 436(a) and (b). If the Secretary determines that no violation occurred, however, the State is not permitted to bring such an action. 45 U.S.C. 436(a)(2) and (b)(2).

includes an express preemption provision. 45 U.S.C. 434. That provision states:

The Congress declares that laws, rules, regulations, orders, and standards relating to railroad safety shall be nationally uniform to the extent practicable. A State may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement. A State may adopt or continue in force an additional or more stringent law, rule, regulation, order or standard relating to railroad safety when necessary to eliminate or reduce an essentially local safety hazard, and when not incompatible with any Federal law, rule, regulation, order, or standard, and when not creating an undue burden on interstate commerce.

Ibid.

4. Responding to FRSA's mandate, in 1971 and 1972 the Secretary submitted to Congress a comprehensive two-part report concerning the grade crossing problem. The report recommended that Congress address the problem of rail crossing safety through a vastly expanded federal funding project administered by the FHWA. See U.S. Dep't of Transportation, *Railroad-Highway Safety Part I: A Comprehensive Statement of the Problem* (1971) (1971 Report to Congress); U.S. Dep't of Transportation, *Railroad-Highway Safety Part II: Recommendations for Resolving the Problem* (1972) (1972 Report to Congress). In response, Congress passed the Highway Safety Act of 1973, Pub. L. No. 93-87, 87 Stat. 282, codified as amended at 23 U.S.C. 130, which established the Rail-Highway Crossings Program. That Program provides States with federal funds "for the elimination of the hazards of railway-highway crossings." 23 U.S.C. 130(a). To participate in the Rail-Highway Crossings Program, States must develop a program systematically

to identify dangerous railroad grade crossings and make them safe. The States must "maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. 130(d); see also 23 C.F.R. 924.9; 23 C.F.R. 1204.4, Highway Safety Program Guideline No. 12(G).

The Secretary, acting through the FRA and FHWA, has promulgated a series of regulations to implement the FRSA and the Rail-Highway Crossings Program. In 1971, FRA adopted rules establishing the maximum allowable operating speed for railroads travelling on all classes of track nationwide. 49 C.F.R. Pt. 213 and App. A; see also 49 C.F.R. 201.4, and recently adopted regulations prescribing reporting requirements for railroads relating to maintenance, inspection, and testing of grade crossing warning devices. 56 Fed. Reg. 33,722 (1991), to be codified at 23 C.F.R. Pt. 234.⁴

The FHWA has also adopted regulations governing the procedures States must follow in identifying hazardous crossings and implementing improvement projects with the use of federal funds under the Rail-Highway Crossings Program. The regulations set forth general principles to guide the "planning, implementation and evaluation of [highway] safety programs and projects." 23 C.F.R. 924.7. With respect to grade crossings, the regulations require that accident and traffic volume statistics, as well as other factors determining the relative hazards posed by different crossings, guide the prioritization and implementation of improvement projects. 23

⁴ The Secretary may enforce regulations promulgated under FRSA through issuance of compliance orders and assessment of civil penalties. 45 U.S.C. 437, 438. See also note 3, *supra*. Those orders are subject to enforcement in actions (in which injunctive relief is available) brought by the Attorney General in federal district court. See 45 U.S.C. 438-439. FRSA does not provide a private right of action to enforce its provisions.

C.F.R. 924.9(a). The States must also evaluate the costs and benefits of improvement projects, and make an annual report to FHWA regarding implementation of its program and the program's effectiveness in improving highway safety. 23 C.F.R. 924.13, 924.15.

The Secretary's regulations also establish specific standards governing the selection of warning devices installed with federal funds. 23 C.F.R. 646.214(b). For "any project where Federal-aid funds participate in the installation," the Secretary requires installation of "automatic gates with flashing light signals" whenever certain conditions exist at the crossing, such as "[h]igh speed train operation combined with limited sight distance." 23 C.F.R. 646.214(b)(3)(i).⁵ Where the specified conditions requiring automatic gates do not exist, "the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency, and/or the railroad, is subject to the approval of FHWA." 23 C.F.R. 646.214(b)(4).

Although the Rail-Highway Crossings Program is administered by the States, the regulations contemplate

⁵ The regulation lists the following conditions in which gate arms are required in order for the safety devices at a crossing to be adequate:

(A) Multiple main line railroad tracks.

(B) Multiple tracks at or in the vicinity of the crossing which may be occupied by a train or locomotive so as to obscure the movement of another train approaching the crossing.

(C) High Speed train operation combined with limited sight distance at either single or multiple track crossings.

(D) A combination of high speeds and moderately high volumes of highway and railroad traffic.

(E) Either a high volume of vehicular traffic, high number of train movements, substantial numbers of school-buses or trucks carrying hazardous materials, unusually restricted sight distance, continuing accident occurrences, or any combination of these conditions.

(F) A diagnostic team recommends them.

23 C.F.R. 646.214(b)(3)(i).

continued participation by railroads in the process of selecting and installing warning devices purchased with federal funds. See, e.g., 23 C.F.R. 646.216(b) (noting that the "preliminary engineering" for the decision may be done by the "railroad's engineering forces"); *1989 Report to Congress* at 4-9. The regulations limit, however, the States' ability to require railroads to contribute to the cost of federally funded improvements. 23 C.F.R. 646.210(a).⁶

In addition to the regulations implementing the Rail-Highway Crossings Program, the Secretary has also issued standards governing the form and placement of all traffic control devices installed at all railway-highway grade crossings, regardless of whether federal funds are used in their installation.⁷ See 23 C.F.R. 646.214(b), 655.603. Those standards are set forth in the *Manual on Uniform Traffic Control Devices* (1988) (Manual or MUTCD), which the Secretary has incorporated into

⁶ 23 U.S.C. 130(b) and (c) provide that railroads are liable to the United States for the value of any benefit received as a result of federally funded grade crossing improvement projects. The Secretary determined, however, that such projects are generally "of no ascertainable net benefit to the railroads and there shall be no required railroad share of the costs." 23 C.F.R. 646.210(b)(1). That determination is consistent with the Department's longstanding practice of not permitting States to require railroads to contribute to the costs of crossings improvements if federal funds participate in the project. See, e.g., 23 C.F.R. 1.14(b) (1958). FHWA regulations permit, however, voluntary contributions by railroads to the cost of crossing improvements. 23 C.F.R. 646.210(d).

⁷ Federal funds are not used for all crossing improvements. The Secretary reported in 1989 that States and railroads spend approximately \$128 million per year on crossing improvement projects undertaken without federal participation. *1989 Report to Congress* at 3-7, 3-8. In contrast to the more extensive federal regulation of improvements using federal funds, federal regulation of such projects is generally limited to the requirements of the MUTCD.

federal law. See 23 C.F.R. 655.601-655.603.⁸ With the exception that all crossings must be equipped at a minimum with a cross-buck warning sign, see MUTCD 8B-2;⁹ see also 23 U.S.C. 130(d), the Manual does not generally specify when particular safety devices are required. Instead, the Manual provides that such decisions should be based upon site-specific engineering judgment. See MUTCD 1A-4.

SUMMARY OF ARGUMENT

I. In FRSA, Congress established that a state law requirement relating to railroad safety may continue in force until the Secretary of Transportation issues regulations covering the subject matter of that state requirement. 45 U.S.C. 434. The issue in this case is whether regulations issued by the Secretary have covered the subject matter of (and hence preempted) a railroad's duty of care under state law to provide adequate warning devices at grade crossings and to travel at a reasonably safe speed. In our view, the Secretary has not issued regulations that totally preempt States from imposing duties of care on railroads relating to grade crossing safety. However, under regulations issued pursuant to the Rail-Highway Crossings Program, 23 U.S.C. 130, the Secretary has preempted States from imposing such duties with respect to grade crossings where the safety devices have been installed with the use of federal funds. With respect to the question of train speed, the Secretary has issued regulations comprehensively regulating the maximum speed at which trains may travel on every

⁸ The MUTCD provides uniform national standards for the form and placement of all traffic control devices on streets and highways nationwide. See MUTCD 1A-3. In 1977, the FHWA amended the MUTCD to address the form and placement of safety devices at grade crossings. See MUTCD Pt. VIII.

⁹ Other provisions of the Manual require that passive control devices, including advance warning signs and pavement markings, be placed at certain crossings. See MUTCD 8B-3, 8B-4.

mile of track nationwide, and has therefore preempted States from regulating that subject matter.

II. Both prior and subsequent to FRSA's enactment, Georgia law required railroads to share responsibility with state authorities to provide adequate warning devices at rail-highway grade crossings. Although state authorities have ultimate responsibility for determining the need and selection of safety devices at grade crossings, state law continues to require railroads to exercise due care in providing safe grade crossings. Nothing in FRSA or the Secretary's regulations changed the validity of that regime, except insofar as the safety devices at a grade crossing are improved using federal funds.

A. Courts that have embraced the broad preemption theory advanced by CSX have grounded their conclusions primarily in the MUTCD. The background and terms of the MUTCD do not, however, relieve railroads of the responsibility to participate in the improvement of unsafe grade crossings. The MUTCD states that it "provides standards for design and application of traffic control devices." MUTCD 1A-4. The MUTCD does not, however, purport generally to determine the circumstances in which particular safety devices are needed, leaving those decisions up to local engineering judgments. *Ibid.* Although the MUTCD states that "[t]he determination of need and selection of devices at a grade crossing is made by the public agency with jurisdictional authority," MUTCD 8A-1, there is no basis for interpreting that language as a federal directive relieving railroads of their pre-existing responsibilities to participate in the process of providing safe grade crossings. The Secretary, whose views on this matter are entitled to deference, has never construed the MUTCD as vesting in state agencies not only the *authority* to determine the need and selection of grade crossing safety devices, but the exclusive *duty* to do so as well.

B. Federal regulations implementing the Rail-Highway Crossings Program, 23 U.S.C. 130, do not generally

preempt States from imposing duties of care on railroads to provide adequate safety devices at grade crossings. One regulation, 23 C.F.R. 646.214(b), specifically mandates, however, the safety devices necessary for adequate warnings at crossings improved with the use of federal funds. That regulation lists particular circumstances in which gate arms are required, and mandates that the warning devices at crossings not requiring gate arms are subject to FHWA approval. In view of its comprehensive scope, we believe that 23 C.F.R. 646.214(b) covers the subject matter of adequate warning devices at federally funded grade crossings, and therefore preempts States from requiring more or different devices at such locations. We do not believe, however, that that regulation can be interpreted as covering the subject matter of safety devices at all grade crossings, regardless of whether they have been improved using federal funds. Such a sweeping reading of the regulation would be at odds with its language, which explicitly limits its application to federally funded projects.

C. In this case, Mrs. Easterwood's claim that the safety devices at the Cook Street crossing were inadequate is not preempted, because that crossing was not improved using federal funds pursuant to the Rail-Highway Crossings Program. The railroad's conduct with respect to the Cook Street crossing appears to have been entirely reasonable, but that is a state law question entirely distinct from the question whether Mrs. Easterwood's claim is preempted altogether.

III. Mrs. Easterwood alleges that CSX violated its common law duty to reduce its speed to accommodate unsafe conditions at the crossing. The Secretary has, however, adopted train speed regulations, 49 C.F.R. Pt. 213 that establish maximum rates of speed on every mile of track in the United States. Those regulations do not impose any duty on the railroad to reduce speed to accommodate other conditions. In our view, the court of

appeals correctly held that the Secretary's regulations cover the subject matter of the state requirement, and preempt any tort claim based upon violation of a state law standard.

The comprehensive character and underlying purposes of the regulations indicate that the Secretary has exhausted, or covered, the subject matter of train speed. The Secretary has concluded that reduced train speeds do not represent an appropriate method of preventing crossing accidents, and has instead focused on ensuring adequate lead time for warning vehicles approaching grade crossings. Local regulation of crossing speeds imposes unreasonable delays on the railways' interstate operations. Moreover, local regulation requiring trains continually to slow down as they approach grade crossings would increase the risks of derailment. Thus, not only have federal train speed regulations covered the subject matter of train speed so as to preempt state rules under FRSA, state regulation of speed is also preempted because of its interference with the full accomplishment of the federal purposes inherent in the Secretary's regulations. See *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2383 (1992).

ARGUMENT

I. STATE LAW REQUIREMENTS RELATING TO RAIL SAFETY ARE NOT PREEMPTED BY FRSA UNLESS THE SECRETARY HAS ADOPTED REGULATIONS COVERING THE SAME SUBJECT MATTER AS THE STATE REQUIREMENT AT ISSUE

The principles governing preemption analysis are well established. State law is preempted under the Supremacy Clause, U.S. Const. Art. VI, Cl. 2, when Congress expressly so provides. See, e.g., *Cipollone v. Liggett Group, Inc.*, 112 S. Ct. 2608, 2617-2618 (1992); *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2381-

2383 (1992); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983).¹⁰ In every case, whether state law is preempted turns on congressional intent. Where, as here, a lawfully promulgated agency regulation is at issue, its preemptive scope is similarly determined by the intent of the issuing authority. *FMC Corp. v. Holliday*, 111 S. Ct. 403, 407 (1990); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714 (1985); *Fidelity Federal Savings & Loan Ass'n v. De La Cuesta*, 458 U.S. 141, 154 (1982).

The Court has made clear, however, that "[c]onsiderations of issues arising under the Supremacy Clause starts with the assumption," *Cipollone*, 112 S. Ct. at 2617 (internal quotation removed), that preemption is not to be found in fields traditionally regulated by the States under the historic police power "unless that was the clear and manifest purpose of Congress." *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. at 715 (quoting *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977) and *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). Providing compensatory remedies through the mechanism of the tort system is undoubtedly within the States' historic police power, see, e.g., *Farmer v. United Brotherhood of Carpenters*, 430 U.S. 290, 304 (1977); *Cipollone*, 112 S. Ct. at 2617-2618, and Georgia has historically required railroads to exercise reasonable

¹⁰ In the absence of express preemption, preemption will nonetheless be implied when it is clear that Congress intended federal regulation of a field to be exclusive. See, e.g., *English v. General Electric Co.*, 496 U.S. 72 (1990); *Pacific Gas & Elec. Co. v. State Energy Resources Conservation & Dev. Comm'n*, 461 U.S. 190 (1983). Finally, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict is present where it is impossible to comply with both federal and state requirements (see *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963)), or where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941); *Gade*, 112 S. Ct. at 2383.

care to make crossings safe. See, e.g., *Macon & Western R.R. v. Davis*, 18 Ga. 679 (1855). Thus, Mrs. Easterwood's claims are presumed not to be preempted, and CSX bears the burden of establishing otherwise. Under this Court's recent decision in *Cipollone*, moreover, that presumption is not overcome by the fact that this is an express preemption case. See *Cipollone*, 112 S. Ct. at 2618; see also *id.* at 2625-2626 (Blackmun, J., concurring).

The claim of preemption in this case rests on Section 434 of FRSA, which states that railroad safety regulation shall be nationally uniform to the extent practicable. That statute expressly defines the scope of state authority to regulate railroad safety. State law requirements "relating to railroad safety" may continue in force "until such time as the Secretary has adopted a rule, regulation, order, or standard covering the subject matter of such State requirement." 45 U.S.C. 434.¹¹ Whether a state law is preempted under FRSA thus turns on whether the Secretary has adopted a rule, regulation, order or standard "covering the subject matter of such State requirement." 45 U.S.C. 434. To the extent that the Secretary has done so, the State may not continue to enforce its requirement; rather, the Secretary's regulation is substituted as the governing rule.

The statutory language suggests that the Secretary's regulations should be found to "cover" the subject matter of a state rule in either of two ways. First, if the specific requirement imposed on the railroad by the State has also been addressed by the Secretary, it is appropriate to conclude that the Secretary has "covered" the

¹¹ FRSA's express preemption is limited by an exception providing that state regulation of a matter covered by federal regulation is permitted if necessary "to eliminate or reduce an essentially local safety hazard," and if it neither unduly burdens interstate commerce nor conflicts with federal regulations. 45 U.S.C. 434. We agree with the court of appeals, CSX Pet. App. 6a n.3, that the local hazard exception is not applicable in this case.

subject of the state requirement. As we argue at point III below, we believe that to be the case with respect to Mrs. Easterwood's allegations of excessive train speed. Second, even if the Secretary has not addressed the specific state requirement, preemption should nevertheless be found if federal regulations deal broadly and substantially with—in effect, occupy the field of—the state law requirement at issue. See *Missouri Pacific R.R. v. Railroad Comm'n of Texas*, 833 F.2d 570, 574-575 & n.5 (5th Cir. 1987) (state regulation is preempted under Section 434 only if it would impair or supplement a federal scheme that “superintends” a particular safety hazard). In other words, only if the Secretary has regulated comprehensively in an area is it fair to conclude that he did not intend to subject the railroads to any further State requirements.¹² In addition, because Congress has vested the Secretary with authority to determine when state regulation of rail safety issues should be superimposed by federal regulations, the stated intent of the Secretary concerning the preemptive scope of the regulations should be dispositive. See *Hillsborough County*, 471 U.S. at 714-715.¹³

¹² Because FRSA makes the Secretary's rules, regulations or orders preemptive if they cover the subject matter of a state requirement, we do not believe that any statement of preemptive intent on the part of the Secretary is necessary for a regulation to be preemptive. Cf. *Hillsborough County*, 471 U.S. at 717 (because agencies frequently issue detailed regulations, implied preemption will rarely be found on the basis of comprehensiveness of agency regulations.) That does not mean, however, that the Secretary's own views of the preemptive scope of his regulations are not to be respected, or that the statutory term “cover” should not be given its ordinary meaning. See *Webster's Third New International Dictionary* 524 (1986) (defining the verb “cover” as “to comprise, include, or embrace in an effective scope of treatment or operation”). Cf. *Morales v. Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2037 (1992) (statute preempting state laws “relating to” airline rates is broadly preemptive).

¹³ The Secretary has specifically stated his preemptive intent on occasion. In regulations dealing with drug testing of railroad

II. FEDERAL LAW HAS NOT PREEMPTED ALL STATE LAW DUTIES ON RAILROADS TO MAINTAIN SAFE GRADE CROSSINGS, BUT HAS PREEMPTED SUCH DUTIES AT GRADE CROSSINGS IMPROVED USING FEDERAL FUNDS

Prior to FRSA's adoption, there is no question that States and railroads shared “joint responsibility” for ensuring the reasonable safety of grade crossings, and both were generally subject to tort damages for injuries sustained at unsafe crossings. *1989 Report to Congress* at 1-7, 1-8, 7-5. Public funds were used to finance improvements, and state highway authorities retained ultimate authority over the selection and installation of warning devices. CSX has not suggested that under this pre-FRSA regime, railroads were somehow released from their common law obligations, or that any inherent conflict existed between that scheme and maintenance of common law duties. The practical effect of that regime was this: The railroad generally was required to identify hazardous crossings, participate in the selection and design of appropriate warning devices, seek approval to install such devices on the public right of way, and fund the cost of necessary upgrades to the extent public funds were unavailable.¹⁴

employees, for example, the Secretary expressly limited the scope of preemption so as not to reach generally applicable state criminal laws. See 49 C.F.R. 219.213(b).

¹⁴ Both before and after FRSA's enactment, the States generally maintained a dual system of responsibility for safety at grade crossings. See, e.g., *Clifton v. Southern Pac. Transp. Co.*, 709 S.W.2d 636, 641 (Tex. 1986) (even though public agency had duty to provide warning devices, railroad “had a duty to report” the dangerous condition “and see that it was” rectified); *Stromquist v. Burlington Northern, Inc.*, 444 N.E.2d 1113, 1116 (Ill. App. 1983) (regardless of whether public agency with authority had ordered installation of safety devices, railroad retained common law duty to provide adequate warning devices); *Decker v. Norfolk & Western R.R.*, 265 N.W.2d 785, 787 (Mich. Ct. App.) (same), appeal denied, 403 Mich. 845 (1978); *Perkins v. National*

The basic issue with respect to the grade crossing claim in this case is whether regulations adopted by the Secretary after FRSA's enactment absolved railroads of their common-law duties to participate in the process of providing safe grade crossings to the public, and to conduct those activities with due care. In our view, Section 434 of FRSA compels the conclusion that federal regulations supplant that duty in part, namely in the circumstances addressed in federal regulations, 23 C.F.R. 646.214(b), covering the selection of warning devices where those devices are installed with federal funds. Beyond those circumstances, however, we do not believe federal grade crossing regulations cover the entire subject matter of a railroad's duty to provide a reasonably safe grade crossing.

A. The MUTCD Does Not Oust The States' Traditional Police Power To Require Railroads To Provide Safe Grade Crossings

Courts embracing the broad preemption theory advanced by CSX have grounded their conclusions primarily in the Manual. See, e.g., *Hatfield v. Burlington Northern R.R.*, 958 F.2d 320 (10th Cir. 1992), petition for cert. pending, No. 91-1977; *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149 (9th Cir. 1983). The Manual's background¹⁵ and nature suggest, however, that it does not—

R.R. Passenger Corp., 289 N.W.2d 462, 466-467 (Minn. 1979) (same).

¹⁵ The Manual was initially issued in 1935 by the Federal Highway Administration (FHWA) in response to congressional directives to develop uniform standards for traffic signal and other warning devices installed on federally assisted highway projects. 23 U.S.C. 109(d); U.S. Dep't of Transportation, *Traffic Control Devices Handbook* 1-2 (1983). In 1974, the Code of Federal Regulations was amended to incorporate the MUTCD into federal law by reference, see 23 C.F.R. 625.3, 655.601 (1974). See also 23 C.F.R. 655.601-655.603 (1991) (noting that the MUTCD, as amended through March 1989, is "the national standard for all traffic control devices").

either directly or by implication—relieve railroads of the responsibility to participate in the improvement of unsafe grade crossings.

1. The Manual expressly states that it "provides standards for the design and application of traffic control devices." The Manual does not, however, purport generally to determine the circumstances in which a particular safety device is needed. To the contrary, the MUTCD states that "[t]he decision to use a particular device at a particular location should be made on the basis of an engineering study of the location." MUTCD 1A-4.¹⁶

CSX maintains, however, that the MUTCD vests exclusive responsibility for initiating and selecting crossing safety improvements in state agencies with jurisdiction over highways. CSX relies on Part VIII of the MUTCD, which was added in 1977 to set forth uniform standards covering the appearance and placement of signs and other safety devices at grade crossings. See U.S. Dep't of Transportation, Federal Highway Administration, Federal Highway Administration Bulletin (Apr. 1, 1977).¹⁷

¹⁶ See also MUTCD 8D-1 ("Due to a large number of * * * variables * * * there is no single standard system [to determine appropriate traffic control devices] at grade crossings. Based on an engineering * * * investigation, a determination is made whether any active traffic control system is required at a crossing and, if so, what type is appropriate.").

¹⁷ The MUTCD was incorporated into federal law by the FHWA, not the FRA, and the agency did not rely upon statutory authority under FRSA in promulgating the Manual. The court of appeals therefore concluded that the express preemption provisions of Section 434 were not implicated. See CSX Pet. App. 10a-11a. In our view, that was error. The plain language of Section 434 refers to *any* regulation adopted by the Secretary of Transportation, without any qualification as to the issuing authority or source of statutory authorization. Thus, regulations adopted by the Secretary pursuant to federal highway legislation trigger FRSA's express preemption if a State regulation "relate[s] to railroad safety" and the Secretary's regulations "cover[] the subject matter" of the state law requirement at issue. 45 U.S.C. 434. We took that posi-

That portion of the MUTCD, however, does not bear such a sweeping interpretation.

Section 8A-1 of the Manual states:

[T]he highway agency and the railroad company are entitled to jointly occupy the right-of-way in the conduct of their assigned duties. This requires joint responsibility in the traffic control function between the public agency and the railroad. The determination of need and selection of devices at grade crossings is made by the public agency with jurisdictional authority. Subject to such determination and selection, the design, installation and operation shall be in accordance with the national standards contained herein.

The crucial sentence in this paragraph—which states that “[t]he determination of need and selection of devices at grade crossings is made by the public agency with jurisdictional authority”—merely describes the process that has long governed the selection of traffic control devices.¹⁸ Even though railroads have long been subject to a common law duty to identify hazardous crossings, and to initiate efforts to make them safe, a public agency ordinarily has final authority to determine what traffic control devices may be installed on public roadways.¹⁹ There

tion in our brief *amicus curiae* urging the Court to deny certiorari in *Public Utilities Comm’n v. CSX Transp., Inc.*, cert. denied, 111 S. Ct. 781 (1991).

¹⁸ Although paragraph 8A-1 is merely descriptive, another section of the MUTCD does require public authorities to retain final approval authority over the installation of any traffic control device. See MUTCD 1A-3.1 (“Traffic control devices shall be placed only by the authority of a public body or official having jurisdiction.”).

¹⁹ As a matter of state law, the fact that a public agency participates in the selection process and has a duty of care does not ordinarily relieve a railroad of the same duty. See *e.g.*, *Southern Ry. v. Georgia Kraft Co.*, 373 S.E.2d 774 (Ga. Ct. App. 1988); *Wright v. Dilbeck*, 176 S.E.2d 715 (Ga. Ct. App. 1970). See also

is, accordingly, no reason to interpret this sentence as a federal directive that relieved railroads of their pre-existing responsibilities to participate in the process of providing safe grade crossings.²⁰ In short, the MUTCD does not “determin[e] the duties and responsibilities of a railroad with respect to the safety of grade crossings.” *Runkle v. Burlington Northern*, 613 P.2d 982, 990 (Mont. 1980).

2. The Department of Transportation has never construed the MUTCD as abandoning the common law of “joint responsibility” in favor of a scheme vesting in States the exclusive duty to provide adequate warning devices at grade crossings. The Department’s interpretive guide to the MUTCD explains that “the highway engineer and railroad engineer will [often] share responsibility to select appropriate traffic control devices] at the grade crossing. The extent of their responsibilities will vary depending upon State law and practices; however, both must be involved in the decision-making process.” U.S. Dep’t of Transportation, *Traffic Control Devices Handbook* 8-1 (1983). The 1989 report submitted to Congress by the Secretary further confirms that the regime of joint responsibility for grade crossing improvements has not been displaced by federal regulations, and continues to this day. See *1989 Report to Congress* at 3-1 (stating that “responsibilities at crossings are not well defined, nor specifically assigned to various parties” because they are “shared”).²¹

²⁰ 91 A.L.R. 2d § 11, at 58-59 (1963) (collecting cases); note 14, *supra*. Thus, there is no inherent conflict between the need to gain public approval of a grade crossing improvement and a common law duty to seek that approval when circumstances warrant.

²¹ Indeed, the Manual affirmatively contemplates that railroads will have occasion to seek installation of new or modified traffic control devices at grade crossings. See MUTCD 8D-1.

²² See also *1989 Report to Congress* at 1-8 (noting that the Interstate Commerce Commission recommended in the early 1960’s (see *Prevention of Rail-Highway Grade Crossing Accidents In-*

That view of the responsible agency is, we submit, entitled to deference. See *Hillsborough County*, 471 U.S. at 714; *Arkansas v. Oklahoma*, 112 S. Ct. 1046, 1059 (1992); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-845 (1984). In view of its nature and scope, and the Secretary's consistent construction of its import, the MUTCD cannot be said to "cover" the subject matter of a railroad's responsibility to provide a safe grade crossing.²² It therefore does not preempt States from continuing to impose such duties.²³

cluding Railway Trains and Motor Vehicles, 322 I.C.C. 1 (1964)) that the public should have sole responsibility to finance grade crossing projects but that "[t]his philosophy was never totally accepted").

²² State imposition of joint responsibility for improvement of grade crossings also does not conflict with the MUTCD requirements. As noted, our view is that the Manual did nothing to alter the preexisting common law allocations of responsibility at grade crossings, nor was there ever thought to be any conflict in that regime. The prospect of tort liability may induce a railroad to develop and implement its own plans for monitoring and improving its grade crossings, which is of course consistent with the overarching Congressional goal of improving grade crossing safety. See 45 U.S.C. 421. Federal interests in promoting uniformity and comprehensive state planning are fully protected by simply requiring such private initiatives to be reviewed and approved by the appropriate state agency before any work may commence. That, in short, is precisely what the MUTCD does.

²³ States may adopt their own version of the MUTCD in lieu of the federal version (so long as the state version substantially complies with the federal), see 23 C.F.R. 655.603(b). To conclude that the MUTCD constituted a delegation of federal decisionmaking authority to the States with an implied condition that States surrender their traditional common law duties of care, one would also have to reach the untenable conclusion that a State, in adopting its own version of the MUTCD, had no choice but implicitly to revoke its traditional tort law.

B. The Regulations Implementing the Rail-Highway Crossings Program Do Not Entirely Preempt State Law Duties Of Care, But Do Preempt States From Requiring Railroads To Provide More Or Different Safety Devices At Crossings That Are Improved Using Federal Funds

In our view, the regulations implementing the Rail-Highway Crossings Program do not completely oust railroads from their state law duties of care. The Secretary's regulations do, however, cover the subject matter of adequate safety devices at crossings that have been improved with the use of federal funds. In particular, 23 C.F.R. 646.214(b) is unique among the Secretary's regulations in that it establishes substantive standards for what constitutes adequate safety devices on grade crossing improvement projects financed with federal funds. Section 646.214(b)(2) expressly states that before any grade crossing within a federally funded highway project is opened for use (or the project accepted by the FHWA), "adequate warning devices for the crossing [must be] installed and functioning properly." 23 C.F.R. 646.214(b)(2). Section 646.214(b)(3)(i) in turn defines what constitutes adequate warning devices. That subsection provides that adequate warning devices

under § 646.214(b)(2) or on any project where Federal-aid funds participate in the installation of the devices are to include automatic gates with flashing light signals when one or more of the following conditions exist * * *.

23 C.F.R. 646.214(b)(3)(i).²⁴ The regulation continues by providing that for crossings not requiring gate arms under subsection 646.214(b)(3), "the type of warning device to be installed, whether the determination is made by a State regulatory agency, State highway agency,

²⁴ As noted above, see note 5, *supra*, the regulation then lists specific conditions requiring the installation of gate arms.

and/or the railroad, is subject to the approval of FHWA." 23 C.F.R. 646.214(b)(4).²⁵

The scope of 23 C.F.R. 646.214(b) indicates that *for federally funded projects* the Secretary has covered the subject matter of what safety devices are appropriate. The regulation requires gate arms in certain circumstances, and requires FHWA approval of the safety devices in all other circumstances. Thus, the warning devices in place at a crossing improved with the use of federal funds have, by definition, been specifically found to be adequate under a regulation issued by the Secretary. Any state rule that more or different crossing devices were necessary at a federally funded crossing is therefore preempted.²⁶

Neither the preemption effected by 23 C.F.R. 646.214(b), nor anything else in the Rail-Highway Crossings Program, however, provides a basis for concluding that railroads are relieved from their duty of care in all circumstances.²⁷ In the absence of a clear statement of preemption, mere participation in the Program should not require the States to give up their traditional police powers; there

²⁵ We note in passing that this regulation—in affirmatively contemplating that railroads might play a role in determining when particular crossing devices are necessary—is further evidence that the MUTCD did not preempt the States from imposing a duty of care on railroads to participate in the process.

²⁶ Such claims might not be preempted, however, to the extent that the plaintiff alleged that the railroad negligently participated in a violation of the standards set forth in 23 C.F.R. 646.214(b), or that changed circumstances rendered the crossing unsafe. Here, no such claims were made.

²⁷ Aside from 23 C.F.R. 646.214(b), numerous federal regulations impose procedural conditions on the use of federal funds to improve grade crossings. The Rail-Highway Crossings Program requires the States to implement a program to survey grade crossings and implement improvement projects, and prescribes factors to be considered in that process. See 23 U.S.C. 130; 23 C.F.R. Pts. 646, 655, 924. We see no reason to infer from that scheme that a state law "requirement" that railroads participate in that process was displaced by silence.

is, accordingly, no basis for concluding that the regulations preempt tort law beyond the specific circumstances in which federal funds have been used to improve a crossing. See *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1 (1981).²⁸

By their express terms, the Secretary's regulations do not apply to crossings improved without the use of federal funds. See 23 C.F.R. 646.214(b)(3)(i) (specifying "adequate warning devices" for "any project where Federal-aid funds participate in the installation of the devices"); 23 C.F.R. 646.210(a) (State laws "requiring railroads to share in the cost" of improvements "shall not apply to Federal-aid projects."). See also *1989 Report to Congress* at 3-2. And the regulations do not have any impact with respect to crossings that are not improved at all.²⁹ Thus, we agree with the court of appeals that the

²⁸ The conclusion that state tort law has not been wholly ousted is further confirmed by 23 U.S.C. 409, which limits the discovery and evidentiary use of "reports, surveys, schedules, lists, or data compiled for the purpose of identifying, evaluating, or planning, the safety enhancement of * * * railway-highway crossings, pursuant to section [] 130 * * * of this title."

The obvious premise of the statute is that claims against railroads have *not* been wholly preempted. Section 409 may pose practical problems in litigating grade crossing tort claims by excluding certain types of probative evidence. Like all rules of privilege, however, the statute reflects a policy judgment that the costs of exclusion are outweighed by the benefits. Moreover, the statute does not appear to bar all forms of proof relating to the railroad's performance of state law duties, but only certain categories of data and reports.

²⁹ The limited preemption that we suggest is further supported by the history of the funding program. The Secretary's reports to Congress confirm that the Rail-Highway Crossings Program was intended to continue the tradition of *supplementing*—but not entirely displacing—the railroads' common law tort responsibility for providing adequate warning devices. First, the study conducted by the Secretary in 1971 observed that railroads had traditionally assumed substantial responsibility for grade crossing safety, see *1971 Report to Congress* at 18-19, A30-A31, but the final report submitted to Congress in 1972, while calling for a

Rail-Highway Crossings Program—which requires the States to survey crossings and prioritize possible improvement projects—does not “explicitly or implicitly” suggest that a railroad has *no* responsibility to identify hazardous crossings and to provide necessary improvements when federal funds have not been allocated for that purpose. CSX Pet. App. 11a.³⁰

C. The Grade Crossing Claim Is Not Preempted Because There Is No Evidence That The Cook Street Crossing Was Improved Using Federal Funds

Mrs. Easterwood is not seeking to hold CSX liable for violation of the specific state law requirements covered by the Secretary’s regulations, namely the selection of

uniform and national approach for crossing improvements, did not recommend termination of the railroads’ involvement in the improvement process. More recently, the Secretary described “the Federal role in crossing improvements” as “primarily one of funding projects, and ensuring that Federal dollars are appropriately spent.” *1989 Report to Congress* at 1-7. The Report recognized that railroads are held liable for damages arising from the train-motor vehicle accidents at crossings. *Id.* at 7-5. After considering current financing mechanisms for the improvement of grade crossings, however, the Secretary recommended no changes in existing programs. *Id.* at 8-7.

³⁰ This conclusion is further underscored by the fact that such categorical preemption would leave substantial areas of railroad conduct essentially unregulated, despite the Secretary’s recognition of the railroads’ critical role in the improvement of grade crossing safety. For example, the Secretary has emphasized that “[p]rompt identification” of “hazardous conditions” on an individual crossing remains “a key element in addressing crossing safety.” *1989 Report to Congress* at 8-7. Railroads are often first to know about such changing hazards, because changes in the railroad’s “traffic volumes and speeds” necessitate further review of crossing safety “to adapt existing warning systems to the new conditions.” *Id.* at 1-2. Rather than inferring that the Secretary made a silent judgment that railroads ought to have no duty to report such information to State authorities and recommend appropriate changes, it is far more reasonable to conclude that the Secretary’s regulations simply did not cover this and many other requirements of due care traditionally imposed by state law.

adequate warning devices where crossing improvements are made with the use of federal funds. Rather, Mrs. Easterwood’s claim is simply that CSX was negligent in failing to install gate arms at the Cook Street crossing. The railroad countered that local authorities refused to install gate arms in order to avoid interference with traffic patterns. See Pet. 5. If CSX’s version of the facts is correct, it does not appear that there could be any basis for a finding of negligence on the part of the railroad.

The question of negligence, however, is obviously distinct from the issue of preemption. No regulation of the Secretary addresses the duty of the railroad to improve the safety of a grade crossing when the State decides not to utilize limited federal funds for that purpose.³¹ As we have discussed, there is also no basis for concluding that the subject of this state requirement was covered through thorough regulation of crossing safety. In the absence of facts suggesting that the plaintiff is challenging specific conduct that was the subject of federal requirements, the claim is not preempted.

III. STATE LAW REQUIREMENTS CONCERNING TRAIN SPEED ARE PREEMPTED BY FRSA BECAUSE THE SECRETARY HAS ADOPTED REGULATIONS COVERING THE SUBJECT MATTER OF TRAIN SPEED

A. Mrs. Easterwood alleges that under Georgia common law, the railroad had a duty to reduce its speed to

³¹ We do not believe that a State’s decision not to upgrade a crossing can be characterized as an affirmative federal decision that the safety devices at that crossing are adequate. Thus, this is not an instance in which a federal regulator’s failure to act represents an affirmative decision that is itself preemptive. See *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 178 (1978); *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767 (1947). The courts that have taken the opposite view have premised their conclusion on the untenable ground (see pp. 19-22, *supra*) that the MUTCD represents a delegation of federal authority to States. See, e.g., *Marshall v. Burlington Northern, Inc.*, 720 F.2d 1149, 1154 (9th Cir. 1983).

accommodate unsafe conditions at the crossing. See, *e.g.*, *Central of Georgia R.R. v. Markert*, 410 S.E.2d 437, 438 (Ga. Ct. App. 1991). The Secretary has, however, adopted train speed regulations, 49 C.F.R. Pt. 213, that establish maximum rates of speed on every mile of track in the United States. Those regulations do not impose any duty on the railroad to reduce speed to accommodate other conditions. In our view, the court of appeals correctly held that the Secretary's regulations cover the subject matter of the state requirement and thus preempt any tort claim based upon violation of a state law standard.

B. The benchmark for train speed regulation chosen by the Secretary is the physical characteristics of the track. Thus, maximum permissible train speeds are determined based on a variety of factors, including the type of surface, structure, geometry, curvature, and elevation of the track. 49 C.F.R. 213.57, 213.59.³² Significantly, federal regulations set the maximum speed permitted on every mile of track throughout the country.³³ The regulations thus specifically address the question of how fast CSX is permitted to travel at the precise location of the accident at issue in this case.

³² The regulations establish six classes of track, and set a maximum speed for each class. For example, class 6 track, which carries the highest train speed limit, must meet tolerances for track gage (49 C.F.R. 213.53), track alignment (49 C.F.R. 213.55), track surface (49 C.F.R. 213.63), and the number of crossties in a defined length of track (49 C.F.R. 213.109). Thus, the regulations take into account the full range of physical characteristics of track.

³³ FRA has also regulated the subject of train speed in other, more limited, contexts. FRA's train signal regulations, 49 C.F.R. Pt. 236, limit train speeds based on both the type of railroad signal system in use and type of railroad operation itself. Other regulations, 49 C.F.R. 240.305, impose substantial penalties on an engineer who exceeds by more than 10 miles per hour the speed limit set by a railroad within the limits set by FRA. FRA has further regulated speed in the context of movement of defective freight cars for repairs, 49 C.F.R. 215.9, and movement of non-complying locomotives, 49 C.F.R. 229.9, and in the context of "blue

The comprehensive character and underlying purposes of the regulations indicate that the Secretary sought to exhaust—or "cover"—the subject matter of train speed. The Secretary has concluded that reduced train speeds do not represent an appropriate method of preventing crossing accidents, *1989 Report to Congress* at 5-10, and has indicated that these regulations govern train speed regardless of grade crossing conditions. *Id.* at 4-10 (stating with respect to operating procedures at crossings that "maximum train speeds are established by the individual railroads in accordance with federal track and signal standards" and that "[c]ourts have ruled that State or local laws on train speeds are preempted by Federal regulations.") Instead, the Secretary has sought to foster grade crossing safety by ensuring adequate lead time for warning vehicles approaching grade crossings. See MUTCD 8C-5. In view of their comprehensive nature and the fact that they directly regulate the same subject as a state requirement that a train travel at a reasonable speed, we believe that the Secretary's train speed regulations "cover" the subject matter of train speed. Accordingly, such state requirements are preempted under FRSA.

Putting aside the question of express preemption under FRSA, Mrs. Easterwood's train speed claim is preempted because of a conflict with the federal regime. State regulation supplementing the comprehensive federal scheme, which unambiguously establishes maximum speeds on all tracks nationwide, would frustrate both the congressionally mandated goal of uniform regulation, see

signal protection" of railroad workers, 49 C.F.R. 218.29. FRA also restricts locomotives not equipped with a speed indicator to speeds of less than 20 miles per hour, 49 C.F.R. 229.117. Finally, FRA has also addressed the speed of trains as particular safety hazards not covered by the general regulations may require. For example, in recognition of "substantial and constant risk to the health and safety of the public," FRA imposed a 30-mile per hour speed limit on hazardous materials transportation conducted by an entire railroad. FRA Emergency Order No. 11, 44 Fed. Reg. 8402 (1979).

45 U.S.C. 434, and the safety concerns underlying federal speed regulations. Local regulation of crossing speeds imposes unreasonable delays on the railroads' interstate operations, and can increase the risk of derailment. *1989 Report to Congress* at 5-10 (a train in an "emergency braking situation is subject to derailing"). As a result, state requirements pertaining to train speed are preempted, because such requirements frustrate the balance between speed and safety drawn in the federal regulations. See *Gade v. National Solid Wastes Management Ass'n*, 112 S. Ct. 2374, 2383 (1992) (state law preempted if it interferes with the full accomplishment of the federal scheme's purposes); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941) (same).

CONCLUSION

The judgment of the court of appeals in both No. 91-790 and No. 91-1206 should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

STUART M. GERSON
Assistant Attorney General

WALTER B. MCCORMICK, JR.
General Counsel

MAUREEN E. MAHONEY
Deputy Solicitor General

PAUL M. GEIER
*Assistant General Counsel
for Litigation*

WILLIAM K. KELLEY
*Assistant to the Solicitor
General*

DALE C. ANDREWS
*Deputy Assistant General
Counsel for Litigation
Department of Transportation*

WILLIAM KANTER
JEFFREY CLAIR
Attorneys

AUGUST 1992